

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROSALYNE SWANSON,

Plaintiff,

v.

NATIONAL CREDIT SERVICES, INC.,

Defendant.

Case No. C19-1504-RSL

ORDER GRANTING  
PLAINTIFF'S MOTION FOR  
CLASS CERTIFICATION

THIS MATTER is before the Court on plaintiff's "Motion for Class Certification." Dkt. # 27. Having reviewed the memoranda submitted by the parties and the remainder of the record, the Court finds as follows:<sup>1</sup>

**I. BACKGROUND**

Defendant is a Washington debt collection company. Dkt. # 28 at 9. The Department of Education ("DOE") hired defendant to collect its federal student loan debts. Dkt. # 29 at ¶¶ 4-6 (Declaration of Nicholas Myrben). Defendant received borrowers' cell phone numbers from three different sources: (1) from DOE directly; (2) from Maximus, DOE's contractor, which maintains a Debt Management Collection System ("DMCS") with information regarding

<sup>1</sup> Defendant requests oral argument. Dkt. # 28 at 1. The Court concludes that oral argument is unnecessary to its disposition of the motion. *See* Local Rules W.D. Wash. LCR 7(b)(4).

1 borrowers; and (3) from third party vendors hired by defendant to perform skip tracing services.  
2 *Id.* at ¶¶ 12-18.

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4 On January 26, 2019, DOE placed plaintiff's unpaid student loan with defendant for  
5 collection. Dkt. # 29 at ¶ 24. That same day, defendant obtained plaintiff's number through skip  
6 tracing services performed by one of its vendors, Interactive Data LLC, also known as idiCORE  
7 ("IDI"). Dkt. # 27-1 at 16 (Exhibit A); Dkt. # 28 at 10. Previously, in November 2017, Maximus  
8 obtained plaintiff's number in a phone conversation with plaintiff regarding potential loan  
9 rehabilitation. Dkt. # 29-4 at 2 (Exhibit 4); Dkt. # 28 at 9. Although the recording of that  
10 conversation became available to defendant on January 26, 2019, defendant did not become  
11 aware of the recording or seek access to the file until almost one year later, when plaintiff filed  
12 the instant lawsuit. Dkt. # 27-1 at 14 (Exhibit A); Dkt. # 29-3 (Exhibit 3). Defendant also  
13 received a DMCS file from Maximus which included plaintiff's number, but not until after it  
14 had already acquired the number from IDI. Dkt. # 29 at ¶ 40.

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16 Defendant called plaintiff on 23 different dates between January 31, 2019, and July 25,  
17 2019. Dkt. # 29 at ¶ 38. Plaintiff alleges that defendant called her up to seven times a day. Dkt.  
18 # 1 at ¶ 15. Plaintiff claims that defendant uses an automatic telephone dialing system ("ATDS")  
19 and prerecorded calls or artificial voice calls in violation of the Telephone Consumer Protection  
20 Act ("TCPA"), 47 U.S.C. § 227, *et seq.* Dkt. # 1 at ¶ 3. Plaintiff seeks to certify and represent  
21 the following class (the "No Consent Class"):

22 All persons in the United States who, from September 19, 2015 through the date  
23 notice is disseminated, (1) Defendant caused to be called; (2) on the person's  
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1 cellphone; (3) using the same dialing equipment that was used to call Plaintiff; (4)  
2 for the purpose of collecting a debt; and (5) had their cellphone number obtained by  
3 NCS in the same way that NCS obtained Plaintiff's cellphone number.

4 The following exclusions apply: (1) any Judge or Magistrate presiding over this  
5 action and members of their families; (2) Defendant, Defendant's subsidiaries,  
6 parents, successors, predecessors, contractors, and any entity in which the  
7 Defendant or its parents have a controlling interest and their current or former  
8 employees, officers and directors; (3) persons who properly execute and file a timely  
9 request for exclusion from the Class; (4) persons whose claims in this matter have  
been finally adjudicate on the merits or otherwise released; (5) Plaintiff's counsel  
and Defendant's counsel; and (6) the legal representatives, successors, and  
assignees of any such excluded persons.

10 Dkt. # 27 at 2; Dkt. # 1 at ¶ 22. Plaintiff seeks declaratory relief, injunctive relief, actual  
11 damages, treble damages for willful or knowing violations, statutory damages, and reasonable  
12 attorney's fees. Dkt. # 1 at 7-8.

14 Defendant denies using ATDS and artificial or prerecorded calls. Dkt # 28 at 10.  
15 Defendant argues that because it had constructive access to the recording of plaintiff's 2017  
16 phone conversation with Maximus and received the DMCS file with plaintiff's number, it had  
17 plaintiff's prior express consent to receiving calls. *Id.* at 7. Defendant also states that its policy is  
18 to obtain express consent during its first live conversation with borrowers. *Id.* at 10. Since prior  
19 express consent is an affirmative defense to TCPA claims, defendant contends the class  
20 definition is overbroad, as it includes class members who gave their prior express consent as  
21 well as those who did not. *Id.* at 8. Defendant maintains that the class thus cannot be certified  
22 due to problems with commonality, typicality, and adequacy of representation. *Id.* at 8; 17.  
23 Defendant also states that determining whether each individual class member gave their prior  
24 consent is an affirmative defense to TCPA claims, defendant contends the class  
25 definition is overbroad, as it includes class members who gave their prior express consent as  
26 well as those who did not. *Id.* at 8. Defendant maintains that the class thus cannot be certified  
27 due to problems with commonality, typicality, and adequacy of representation. *Id.* at 8; 17.  
28 Defendant also states that determining whether each individual class member gave their prior

1 express consent to Maximus will disrupt predominance. *Id.* at 17. Separately, defendant avers  
2 that small claims court provides a superior forum for members of the putative class to litigate  
3 their TCPA claims. *Id.* at 22-23. For the reasons set forth below, the Court disagrees and grants  
4 class certification.  
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## 6 **II. THRESHOLD ISSUES**

### 7 **A. Jurisdiction**

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9 The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331.  
10 Plaintiff has stated a cause of action arising under the TCPA, which is a federal statute.  
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### 12 **B. Article III Standing**

13 Defendant argues that the putative class is overbroad because it contains class members  
14 who gave their prior express consent to receiving phone calls, and that those members therefore  
15 lack requisite injury for Article III standing. Dkt. # 28 at 22. For the reasons outlined below, the  
16 class has standing to bring this case.  
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18 Article III, § 2 of the Constitution limits the federal judicial power to “cases” and  
19 “controversies.” Standing is a judicially-created doctrine designed to protect the separation of  
20 powers concerns embodied in the text of Article III. *Allen v. Wright*, 468 U.S. 737, 752 (1984)  
21 (“[T]he law of Art. III standing is built on a single basic idea—the idea of separation of  
22 powers.”) (abrogated on other grounds by *Lexmark Intern., Inc. v. Static Control Components*,  
23 *Inc.*, 572 U.S. 118 (2014)); *see also INS v. Chadha*, 462 U.S. 919, 946 (1983) (“[S]eparation of  
24 powers was not simply an abstract generalization in the minds of the Framers: it was woven into  
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1 the documents that they drafted in Philadelphia in the summer of 1787.”) (quoting *Buckley v.*  
2 *Valeo*, 424 U.S. 1, 124 (1976)). Standing protects separation of powers by ensuring that  
3 plaintiffs have an adequate stake in the outcome of the litigation. *TransUnion v. Ramirez*, -- U.S.  
4 ---, 141 S.Ct. 2190, 2203 (2021).

6 To satisfy Article III standing, a plaintiff must demonstrate that they have (1) suffered an  
7 injury in fact, which is (2) fairly traceable to the challenged conduct of the defendant, and  
8 (3) likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504  
9 U.S. 555, 560-61 (1992). An injury in fact exists where the plaintiff suffered “an invasion of a  
10 legally protected interest” that is “concrete and particularized” and “actual or imminent, not  
11 conjectural or hypothetical.” *Id.* at 560. It is well-established that Congress may “elevat[e] to the  
12 status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in  
13 law.” *Id.* at 578 (emphasis in original). However, a plaintiff who sues under a statute providing a  
14 right to sue or creating new legal rights must still establish concrete injury. *See Spokeo v.*  
15 *Robins*, 578 U.S. 330, 341 (2016) (plaintiff alleging violation of the Fair Credit Reporting Act  
16 could not satisfy the injury-in-fact requirement of Article III by “alleg[ing] a bare procedural  
17 violation, divorced from any concrete harm.”). The Ninth Circuit recently clarified that in class  
18 actions seeking injunctive or other equitable relief, only one plaintiff is required to demonstrate  
19 standing. *Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, 31 F.4th 651, 682 n. 32  
20 (9th Cir. 2022). However, in class actions seeking damages, all members must have Article III  
21 standing. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 594 (9th Cir. 2012). Since the  
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1 putative class seeks damages and injunctive relief in this case, the Court will consider whether  
2 all potential class members can establish concrete injury in fact sufficient to support standing.  
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4 In the unique context of the TCPA, alleging a violation of the statute itself satisfies the  
5 requirement of concrete injury in fact and is sufficient to support Article III standing. *See Van*  
6 *Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (explaining that  
7 plaintiff, who alleged a violation of the TCPA, established concrete injury in fact, but affirming  
8 the district court's grant of summary judgment for defendant because plaintiff gave his prior  
9 express consent to be contacted). The TCPA "establishes the substantive right to be free from  
10 certain types of phone calls and texts absent consumer consent." *Id.* In enacting the TCPA,  
11 Congress recognized that unsolicited phone calls and text messages "by their nature, invade the  
12 privacy and disturb the solicitude of their recipients." *Id.* (internal citations omitted).  
13 Additionally, "[e]xpress consent is not an element of a plaintiff's prima facie case but is an  
14 affirmative defense for which the defendant bears the burden of proof." *Id.* at 1044.  
15

16 Here, plaintiff claims that defendant has violated the TCPA and that the alleged violation  
17 has caused "(a) aggravation, nuisance, and invasions of privacy...(b) wear and tear on [class  
18 members'] cellphones, (c) interference with the use of their phones, (d) consumption of battery  
19 life, (e) loss of value for [wireless plans], and (f) diminished use, enjoyment, value, and utility of  
20 their telephone plans." Dkt. # 1 at ¶ 17. The injuries alleged are consistent with the behavior  
21 Congress sought to deter in enacting the TCPA and are concrete enough to confer Article III  
22 standing for all putative class members. Otherwise, the mere assertion of an affirmative defense  
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1 based on express consent would make every TCPA action nonjusticiable.

### 2 3 4 **III. DEFINING THE CLASS**

5 Class certification is governed by Federal Rule of Civil Procedure 23. Rule 23 is based in  
6 equity practice. *Amchem Prods. v. Windsor*, 521 U.S. 591, 613 (1997). Accordingly, the Court  
7 has significant discretion when making a class certification decision. *Yokoyama v. Midland Nat'l*  
8 *Life Ins. Co.*, 594 F.3d 1087, 1090 (9th Cir. 2010). District courts in the Ninth Circuit are  
9 divided over whether a court may modify the definition of a putative class. *See Jammeh v. HNN*  
10 *Assocs., LLC*, 2020 WL 5407864 at \*9 (W.D. Wash. 2020) (slip copy) (collecting cases).  
11 However, courts in this jurisdiction have recognized their equitable power to reasonably modify  
12 a class definition to bring it within the ambit of Rule 23. *See, e.g., Rosas v. Sarbanand Farms,*  
13 *LLC*, 329 F.R.D. 671, 694 (W.D. Wash. 2018) (adding a subclass); *see also Jammeh*, 2020 WL  
14 5407864 at \*9 (“[T]his court adopts an approach that permits modest modifications to  
15 the class definition so long as the proposed modifications are minor, require no additional  
16 discovery, and cause no prejudice to defendants.”).

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19 Plaintiff’s proposed class definition is limited to persons who “had their cellphone  
20 number obtained by [defendant] in the same way that [defendant] obtained [plaintiff’s]  
21 cellphone number.” Dkt. # 27 at 4. Defendant argues this definition is overbroad because it  
22 acquired plaintiff’s number in three different ways: through (1) skip tracing on January 26,  
23 2019; (2) its constructive access to Maximus’s files, including a recording of plaintiff providing  
24 her number to Maximus in November 2017; and (3) a DMCS file update from Maximus which  
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1 included plaintiff's number, received after plaintiff's number was already imported into  
2 defendant's system. Dkt. # 28 at 13; Dkt. # 27-1 at 14 (Exhibit A). Defendant also asserts that it  
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4 obtained consent from some putative class members during live phone conversations, and that  
5 those members should be excluded. Dkt. # 28 at 8; 10.

6         At this stage, the Court declines to make any substantive modifications to the class  
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8 definition, other than to clarify that putative class members whose numbers were obtained the  
9 "same way" that defendant obtained plaintiff's number means persons whose numbers were  
10 acquired through IDI's services *and* through Maximus's DMCS files or recorded conversations.  
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12 Whether defendant's right of access to Maximus's files containing borrower information was  
13 sufficient to confer consent is an issue which is capable of classwide resolution. If defendant  
14 prevails on this defense, then nothing here alters the Court's equitable power to modify or  
15 decertify the class. *See* Fed. R. Civ. P. 23(c)(1)(C).  
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17         It is also inappropriate to modify the class based on defendant's live call consent defense.  
18 Defendant has not offered a single case in support of its contention that requesting consent *after*  
19 contacting borrowers constitutes "*prior* express consent" within the meaning of the TCPA. Dkt.  
20 # 28. The Court will not create a subclass or refuse certification based on a defense that is  
21 neither factually nor legally supported.  
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23         Notably, plaintiff's definition excludes borrowers who provided their number directly to  
24 the original creditor, DOE, during the original transaction resulting in the debt. No one,  
25 including plaintiff, argues that borrowers who provided their number directly to DOE did not  
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1 give adequate prior express consent. *See* Dkt. # 31 at 9. The Court’s clarification should resolve  
 2 at least some of defendant’s concerns regarding overbreadth. The rest are addressed below.

#### 3 4 **IV. PREREQUISITES OF A CLASS**

5 The party seeking certification must demonstrate that all four prerequisites of Rule 23(a)  
 6 are met, as well as one of the requirements of Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*,  
 7 253 F.3d 1180, 1186 (9th Cir. 2001). Rule 23(a) “requires that plaintiffs demonstrate  
 8 numerosity, commonality, typicality, and adequacy of representation in order to maintain a class  
 9 action.” *Mazza*, 666 F.3d at 588 (9th Cir. 2012).

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 11 Although the Court will not decide the underlying merits of a case at the class  
 12 certification stage, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974), it will undertake  
 13 a “rigorous analysis” to ensure the party seeking certification affirmatively complies with the  
 14 Rule, which frequently requires peeking at the merits of plaintiff’s claims, *Wal-Mart Stores, Inc.*  
 15 *v. Dukes*, 564 U.S. 338, 350-51 (2011) (citing *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161  
 16 (1982)); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011). In the Ninth  
 17 Circuit, “plaintiffs must prove the facts necessary to carry the burden of establishing that the  
 18 prerequisites of Rule 23 are satisfied by a preponderance of the evidence.” *Olean*, 31 F.4th at  
 19 665. “[A]ny admissible evidence” may be offered by members of the putative class in support of  
 20 class certification. *Id.* (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 454-55 (2016)).

#### 21 **A. Numerosity**

22 Rule 23(a)(1) tests whether “the class is so numerous that joinder of all members is  
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1 impracticable.” In this case, defendant states there are at least 3,308 accounts where a phone  
2 number was associated with both IDI and a DMCS file. Dkt. # 28 at 16. Defendant does not  
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4 argue that joinder of all putative class members is practicable. The Court finds numerosity is  
5 satisfied.

## 6 **B. Commonality**

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8 Commonality requires “questions of law or fact common to the class.” Fed. R. Civ. P.  
9 23(a)(2). Although the plain text of the Rule constrains itself to searching for common  
10 “questions,” the key inquiry actually trains on whether the class proceeding will “generate  
11 common *answers* apt to drive the resolution of the litigation.” *Wal-Mart*, 564 U.S. at 350  
12 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L.  
13 REV. 97, 132 (2009)) (alteration in original). However, this does not mean that every question  
14 raised and answered must be shared in common; all that is required is “a single *significant*  
15 question of law or fact.” *Mazza*, 666 F.3d at 589 (emphasis added); *see also Castillo v. Bank of*  
16 *Am., NA*, 980 F.3d 723, 728 (9th Cir. 2020) (“Even a single common question of law or fact that  
17 resolves a central issue will be sufficient to satisfy this mandatory requirement.”).

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19 Plaintiff alleges that the following questions are shared in common by class members:  
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21 (1) whether numbers acquired via skip tracing constitute valid prior express consent; (2) whether  
22 numbers given to Maximus, then made available to defendant via recording or DMCS file,  
23 constitute valid prior express consent; (3) whether the dialing equipment defendant used  
24 constitutes an ATDS under the TCPA; and (4) whether defendant made prerecorded or artificial  
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1 voice calls. Dkt. # 27 at 7-8; Dkt. # 31 at 9-10. In response, defendant argues that plaintiff has  
2 not met her burden under Rule 23(a)(2) because individual inquiries as to whether each class  
3 member consented to the use of their phone number will predominate over issues held in  
4 common. Dkt. # 28 at 17-18.

6       The Court finds commonality satisfied in this case. Plaintiff has identified specific  
7 common contentions capable of classwide resolution. *Wal-Mart Stores, Inc.*, 564 U.S. 338, the  
8 seminal case on Rule 23(a)(2), is not apposite. There, a putative class of approximately 1.5  
9 million current and former female employees of Wal-Mart sued their employer under Title VII,  
10 alleging that Wal-Mart's policy of giving discretion to local hiring managers in pay and  
11 promotion decisions led to discrimination against female employees. *Id.* at 343. In finding that  
12 commonality was not met, Justice Scalia explained that based on the sheer number of hiring  
13 managers exercising their individual judgment, "demonstrating the invalidity of one manager's  
14 use of discretion [would] do nothing to demonstrate the invalidity of another's." *Id.* at 355-56.  
15 Here, by contrast, the common questions posed by plaintiff can be resolved as to all class  
16 members in one stroke. Accordingly, to the extent that any problems of individualized  
17 determinations regarding consent may arise, that matter is more aptly addressed under 23(b)(3)  
18 predominance inquiry.  
19

### 20 **C. Typicality**

21       Typicality asks whether "the claims or defenses of the representative parties are typical of  
22 the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The purpose of the typicality  
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1 requirement is to assure that the interest of the named representative aligns with the interests of  
2 the class.” *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (citing *Hanon v.*  
3 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). The analysis is guided by whether  
4 (1) “other members have the same or similar injury,” (2) “the action is based on conduct which  
5 is not unique to the named plaintiffs,” and (3) “other class members have been injured by the  
6 same course of conduct.” *Gonzalez v. United States Immigration and Customs Enf’t*, 975 F.3d  
7 788, 809 (9th Cir. 2020) (quoting *Hanon*, 976 F.2d at 508). “Rule 23(a) is ‘permissive’ and  
8 requires nothing more than that a class plaintiff’s claims be ‘reasonably coextensive with those  
9 of absent class members.’” *Id.* (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir.  
10 1998)). The commonality and typicality analyses “tend to merge,” as both ensure a class  
11 proceeding will be economical and adequately protect the interests of absent class members.  
12 *Meyer v. Portfolio Recovery Assocs.*, 707 F.3d 1036, 1041 (9th Cir. 2012) (citing *Wal-Mart*, 564  
13 U.S. at 349, n. 5); *see also Amchem*, 521 U.S. at 626 (without explicitly addressing typicality,  
14 the Court found that named plaintiffs in class settlement, who were all currently injured, were  
15 inadequate representatives under 23(a)(4) because their injuries and the subsequent relief they  
16 desired differed from absent putative class members who had been exposed to asbestos but had  
17 no current manifestation of injuries).

18 Under the permissive standards of Rule 23(a)(3), plaintiff’s allegations are sufficient to  
19 satisfy typicality. Plaintiff and unnamed class members “have the same or similar injury”  
20 because they each allege unwanted contact in violation of the TCPA. Dkt. # 27 at 2. The “action  
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1 is based on conduct not unique to the named plaintiffs” because defendant allegedly used the  
2 same dialing equipment to contact class members and obtained the numbers at issue through the  
3 same processes (*i.e.*, through IDI skip tracing and Maximus). *Id.* Finally, absent class members  
4 have allegedly been “injured by the same course of conduct”—that is, by defendant’s contact  
5 without consent, using an ATDS and artificial or prerecorded calls. *Id.*

6  
7 Defendant argues that plaintiff is an atypical representative because she provided her  
8 express consent to being contacted by giving her number to Maximus, while other members of  
9 the class, whose numbers were simply obtained from IDI, did not. Dkt. # 28 at 12; 15 (“Plaintiff  
10 is not typical of any number called without consent obtained via third-party vendor only.”).  
11 However, defendant’s concerns about typicality are addressed by the Court’s clarification that  
12 the class definition only extends to those persons whose phone numbers defendant obtained  
13 from both IDI and Maximus. Thus, defendant’s argument that plaintiff consented to contact by  
14 providing her number to Maximus can be tested against the class as a whole.

#### 15 **D. Adequate Representation**

16 The representative parties—meaning the named plaintiff as well as class counsel—must  
17 “fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4); *see also* Fed.  
18 R. Civ. P. 23(g)(4). The purpose of the adequacy of representation inquiry is to ensure due  
19 process for absent class members. *Hansberry v. Lee*, 311 U.S. 32, 43 (1940) (the requirements  
20 of due process and full faith and credit are satisfied for absent class members as long as they are  
21 adequately represented by the named plaintiff); *Taylor v. Sturgell*, 553 U.S. 880, 900-01 (2008)

1 (describing the limits on nonparty preclusion as based on concerns grounded in adequacy of  
2 representation, which, “[i]n the class action context . . . are implemented by the procedural  
3 safeguards contained in Federal Rule of Civil Procedure 23.”).

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5 Rule 23(a)(4) is thus designed to screen conflicts of interest between representatives and  
6 absent class members. *See Amchem*, 521 U.S. at 625 (citing *General Tel. Co.*, 457 U.S. at 157).  
7 Conflicts must be “actual,” meaning supported by record evidence, not purely speculative. *See*,  
8 *e.g., Social Servs. Union, Local 535 v. County of Santa Clara*, 609 F.2d 944, 948 (9th Cir. 1979)  
9 (finding that where district court improperly relied on conflict not supported in the record,  
10 “[m]ere speculation as to conflicts that may develop... [was] insufficient to support denial of  
11 initial class certification.”). Significant conflicts undermine the ability of the representative party  
12 to competently represent absent class members. *See, e.g., Amchem*, 521 U.S. at 626 (divergent  
13 concerns regarding settlement payouts between representative parties and absent class members  
14 warranted decertification under 23(a)(4)). However, when named plaintiffs or class counsel are  
15 conflicted, the presence of non-conflicted representatives may establish adequate representation.  
16 *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 961 (9th Cir. 2009) (certifying class settlement  
17 because two of the seven class representatives did not have conflicting incentive agreements). In  
18 addition to evaluating whether any conflicts exist, 23(a)(4) analyzes the competency of  
19 representative parties, including whether they will “prosecute the action vigorously on behalf of  
20 the class.” *Staton v. Boeing Co.*, 327 F.3d 928, 957 (9th Cir. 2003) (quoting *Hanlon*, 150 F.3d at  
21 1020).

1 To establish adequacy, named plaintiffs must (1) “be part of the class” and (2) “possess  
 2 the same interest and suffer the same injury as the class members.” *Amchem*, 521 U.S. at 625-26  
 3 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)). Here, as  
 4 previously explained, the named plaintiff is part of the class she seeks to represent and possesses  
 5 the same interest and suffered the same alleged injury as absent class members. *See supra* Part  
 6 IV B.; Part IV C. (discussing commonality and typicality). Thus, there are no apparent conflicts  
 7 between plaintiff and absent class members. Moreover, defendants have put forth no evidence  
 8 indicating that plaintiff will not serve as a competent class representative. To the contrary, the  
 9 record suggests that plaintiff has taken her duty as a class representative seriously and is  
 10 prepared to vigorously prosecute the action on behalf of the class. Dkt. # 27; Dkt. # 31.

14 Defendants do not challenge the adequacy of class counsel to represent absent class  
 15 members. The Court does not detect a conflict of interest in the record, and *pro hac vice* counsel  
 16 has submitted evidence of their experience litigating similar TCPA class actions. Dkt. # 27-2  
 17 (Exhibit B). Therefore, the Court finds that both plaintiff and counsel are adequate class  
 18 representatives.  
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## 21 V. MAINTENANCE OF A CLASS

### 22 A. Rule 23(b)(3) Requirements

23 In addition to meeting all four prerequisites of Rule 23(a), a plaintiff must also meet one  
 24 of the three requirements of 23(b). The Court considers this motion under Rule 23(b)(3).  
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26 An “adventuresome innovation” created specifically with damages class actions in mind,  
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1 Rule 23(b)(3) imposes two additional requirements on a putative class beyond the four  
2 prerequisites of 24(a): predominance and superiority. *Amchem*, 521 U.S. 615 (quoting Kaplan, *A*  
3 *Prefatory Note*, 10 B.C. IND. & COM. L.REV. 497, 497 (1969)). These additional requirements  
4 reflect the concern that, in actions for money damages, classwide adjudication may “not as  
5 clearly [be] called for as...in Rule 23(b)(1) and (b)(2) situations [yet] may nevertheless be  
6 convenient and desirable.” *Id.* (internal quotations and citations omitted). Accordingly, the  
7 notification requirements of 23(b)(3) are heightened and class members’ right to opt-out is  
8 mandatory. *Compare* Fed. R. Civ. P. 23(c)(2)(B) (“For any class certified under Rule 23(b)(3),  
9 the court must direct to class members the best notice that is practicable...including individual  
10 notice to all members who can be identified through reasonable effort.”), *with* Fed. R. Civ. P.  
11 23(c)(1)(A) (“For any class certified under Rule 23(b)(1) or (b)(2), the court may direct  
12 appropriate notice to the class.”); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176  
13 (1974) (discussing the requirements of notice and opt out in a Rule 23(b)(3) action).

### 18 **1. Predominance**

19 Under the Rule 23(b)(3) predominance inquiry, the Court must find “that the questions of  
20 law or fact common to class members predominate over any questions affecting only individual  
21 members.” Fed. R. Civ. P. 23(b)(3). “An individual question is one where members of a  
22 proposed class will need to present evidence that varies from member to member, while a  
23 common question is one where the same evidence will suffice for each member to make a *prima*  
24 *facie* showing or the issue is susceptible to generalized, class-wide proof.” *Tyson Foods*, 577  
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1 U.S. at 453 (quoting 2 W. Rubenstein, NEWBERG ON CLASS ACTIONS § 4:50, 196-197 (5th ed.  
2 2012 (internal quotations omitted))). Although somewhat similar to the commonality  
3 prerequisite of 23(a)(2), commonality and the predominance requirement of 23(b)(3) must be  
4 analyzed separately. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (“Rule 23(b)(3)’s  
5 predominance criterion is even more demanding than 23(a).”); *Amchem*, 521 U.S. at 624 (1997)  
6 (finding that even if named and unnamed plaintiffs’ shared asbestos exposure was sufficient to  
7 satisfy commonality, too many individual issues regarding the circumstances and subsequent  
8 effects of exposure predominated to uphold class certification). Where individual inquiries  
9 would overwhelm common issues, certification under Rule 23(b)(3) is inappropriate. *Amchem*,  
10 521 U.S. at 623 (finding disparate circumstances of exposure to asbestos-containing products as  
11 well as differences in state law undermined predominance). However, the class may be certified  
12 notwithstanding the existence of other important issues which may need to be litigated on an  
13 individual basis as long as the central issues in an action are common to the class and  
14 predominate. *Tyson*, 577 U.S. at 453 (explaining that as long as the central issues are common  
15 and predominate, other issues that need to be tried individually, including damages or  
16 affirmative defenses, will not defeat a Rule 23(b)(3) motion).

17 The Court finds that common issues central to resolution of plaintiff’s claims  
18 predominate over individualized inquiries in this case. Those common issues are: (1) whether  
19 numbers acquired via skip tracing constitute valid prior express consent; (2) whether numbers  
20 given to Maximus, then made available to defendant via recording or DMCS file, constitute  
21

1 valid prior express consent; (3) whether the dialing equipment defendant used constitutes an  
2 ATDS under the TCPA; and (4) whether defendant made prerecorded or artificial calls under the  
3 TCPA. Dkt. # 27 at 7-8; Dkt. # 31 at 9-10; *see supra* Part IV B. (discussing commonality).  
4 These issues predominate over any individualized determinations as to defendant's affirmative  
5 consent defense.  
6

7  
8 Defendant states that predominance is defeated "[w]hen prior express consent is not  
9 provided in a consistent manner." Dkt. # 28 at 17. Defendant argues consent was not uniformly  
10 secured, but was instead obtained in two ways that will require individualized consideration:  
11 namely, via live call or through access to Maximus's files. *Id.* at 19.  
12

13 As aforementioned, the fact that defendant argues it secured post hoc consent from some  
14 class members during a live phone conversation after already obtaining their numbers from IDI  
15 and Maximus does not destroy predominance. *See Meyer*, 707 F.3d at 1042 ("Pursuant to the  
16 FCC ruling, prior express consent is consent to call a particular telephone number in connection  
17 with a particular debt that is given *before* the call in question is placed.") (emphasis added); *see*  
18 *supra* Part III (discussing the class definition).  
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21 The question of whether access to Maximus's files was sufficient to confer consent under  
22 the TCPA is a closer legal question, but not one that overcomes predominance at this stage. If  
23 defendant prevails on this consent defense as to only a subset of class members (for instance, if  
24 defendant had consent as to numbers it obtained via DMCS file update before receiving the  
25 number from IDI), then the Court may revisit the issue of predominance at that time and adjust  
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28

1 the class accordingly. However, the issue of whether defendant can show that its right of access  
 2 to Maximus's files constituted prior express consent is one that is currently capable of classwide  
 3 resolution. Accordingly, while the affirmative defenses defendant presses will no doubt be  
 4 important to the outcome of the litigation, they presently do not undercut the central common  
 5 issues in this case.  
 6

## 7 **2. Superiority**

8  
 9 In addition to finding that common questions of law or fact predominate, the Court must  
 10 also find "that a class action is superior to other available methods for fairly and efficiently  
 11 adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). In determining whether a class action is  
 12 superior, the Court must consider the following list of non-exhaustive factors:  
 13

14 (A) the class members' interests in individually controlling the prosecution or  
 15 defense of separate actions; (B) the extent and nature of any litigation concerning  
 16 the controversy already begun by or against class members; (C) the desirability or  
 17 undesirability of concentrating the litigation of the claims in the particular forum;  
 18 and (D) the likely difficulties in managing a class action.

19 Generally, where the individual damages suffered are small, the first factor weighs in  
 20 favor of certification. *Zinser*, 253 F.3d 1190. In the context of TCPA violations, individual  
 21 damages of \$500 are considered sufficiently small to warrant class adjudication. *See, e.g., Agne*  
 22 *v. Papa John's Int'l, Inc.*, 286 F.R.D. 559, 571 (W.D. Wash. 2012); *Kavu, Inc. v. Omnipak*  
 23 *Corp.*, 246 F.R.D. 642, 650 (W.D. Wash. 2007). Thus, the first factor weighs in favor of  
 24 plaintiff. Second, there is no evidence in the record that any individual class members have  
 25 commenced separate actions against defendant. This also weighs in plaintiff's favor.  
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1 Defendant's arguments focus on the third and fourth factors. Specifically, defendant asserts that  
2 class adjudication will prove unmanageable and that small claims court is a superior forum for  
3 these claims. Dkt. # 28 at 23. For the reasons given above, *supra* Part V A. 1., classwide  
4 adjudication of the legal issues regarding consent and whether, if consent was not provided,  
5 defendant improperly used ATDS and/or made prerecorded or artificial calls do not present  
6 intractable manageability issues for the Court.  
7

8  
9 As to the fourth factor, the Court is unconvinced that small claims court provides a  
10 superior forum for resolution of these claims. Defendant argues that prosecuting individual  
11 TCPA actions in small claims court is superior to class litigation because plaintiffs can avoid  
12 attorney's fees. Dkt. # 28 at 23-24. Although plaintiffs can litigate TCPA actions in small claims  
13 court *pro se* and thus avoid attorney's fees, there is no indication that any class members have  
14 attempted to pursue a TCPA claim without the assistance of counsel. Moreover, additional costs  
15 and burdens attend *pro se* litigation which might deter an individual borrower from prosecuting  
16 a creditor corporation. Finally, the possibility of an award of attorney's fees in this class action  
17 is not likely to be a major consideration for putative class members who otherwise have shown  
18 no interest in pursuing the claim on their own: the Court retains discretion in setting the amount  
19 of attorney's fees awarded. *See* Fed. R. Civ. P. 23(h) ("In a certified class action, the court may  
20 award reasonable attorney's fees."); *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 158 (2016)  
21 (discussing award of attorney's fees under the TCPA).  
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## VI. APPOINTMENT OF CLASS COUNSEL

Under Rule 23(g)(1), a Court must appoint class counsel in a class certification order.

The factors the Court shall consider in appointing counsel include:

(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A). Additionally, the Court "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." *Id.* (g)(1)(B). Here, plaintiff's counsel, Patrick Peluso and Stephen L. Woodrow of Woodrow & Peluso, LLC, and Michael P. Matesky, II of Matesky Law PLLC, seek appointment as class counsel. Dkt. # 27. There is significant evidence in the record of the work counsel has done in bringing this case, and counsel's experience litigating TCPA class actions and settlements is also well-documented. Dkt. # 27-2 (Exhibit B). The Court therefore finds plaintiff's counsel adequate and enters appointment in this case, contingent upon counsel's continued observation of their respective responsibilities as counsel *pro hac vice* and local counsel. Local Rules W.D. Wash. LCR 83.1(d).

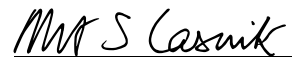
## VII. CONCLUSION

For all of the foregoing reasons, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for class certification, Dkt. # 27, is GRANTED pursuant to the modifications set forth in this Order;

2. Patrick H. Peluso and Steven L. Woodrow of Woodrow & Peluso, LLC, and Michael Matesky of Matesky Law, PLLC, are appointed as class counsel; and
3. Rosalyne Swanson is appointed as class representative.

Dated this 31st day of May, 2022.



Robert S. Lasnik  
United States District Judge